

JERSEY / JUDGMENT

Holmes -v- Lingard [2016]

JRC 198A (31 October 2016)

[2016] JRC 198A

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons in relation to an application for a stay by the plaintiff and consequential directions given by me.

Background

2. The background to this matter is set out at paragraphs 2 to 6 of an earlier decision reported at Holmes-v-Lingard

[2015] JRC 172 . Pursuant to that judgment I concluded that the parties had settled their dispute and therefore struck out the plaintiff's claim. 3. In a judgment of the Royal Court in this matter reported at Holmes-v-Lingard

[2016] JRC 167 the Royal Court concluded that the question of whether or not the parties had settled, with some reluctance, was a matter for trial. At paragraph 19 the Royal Court stated as follows:- "19. It is clear that the Master took the view that in the event it could be concluded that a binding settlement had been reached between the parties but to allow such proceedings to continue would be both vexatious and an abuse of the process of the Court because the Court would be asked to adjudicate on a matter that had been resolved by agreement. We agree that it is completely clear that such an agreement has been reached then it would be appropriate to strike out the claim. If, however, that question turned on disputed fact then in our view the more appropriate course was for the agreement to be pleaded and perhaps dealt with as a preliminary issue." [Emphasis Added] The plaintiff's applications 4. The first application made by the plaintiff was for the defendants to comply with a disclosure order set out in paragraph 2 of the Act of Court of 11 th March, 2015. Paragraph 2 of this Act of Court states as follows:- "2. by 5.00 p.m. Wednesday the 25th March, 2015, the Defendants do provide discovery of the following documents to the Plaintiff:- (a) All loan agreements showing any sums advanced to the

Plaintiff or Home Farm Developments Limited, whether such loans were secured or unsecured; (b) Bank statements showing when any such loans were made, to whom they were made with any other entries being redacted; (c) All ledgers showing amounts owed to the Defendants including any accrued contractual interest." 5. The judgment I made in respect of this request was that it was not appropriate for this application to be determined during a directions hearing listed for one hour. This effectively was an application for breach of an order. To decide this application requires a detailed affidavit to be filed setting out exactly why it is alleged that the defendants are in breach. Accordingly, I adjourned this application for determination on another day. In addition, for reasons set out later in this judgment, because I made an order for general discovery, I ordered that any application for breach of paragraph 2 of the Act of Court of 11 th March, 2015, should not be heard before general discovery had been provided. 6. In relation to the question of documentation, I was also asked about production of documents held by Bois Bois because it appears that Bois Bois represented both the plaintiff and the defendants at different times and held records relevant to the present dispute. I therefore explained to both parties that both were entitled to require Bois Bois to produce any files where either of the parties had retained Bois Bois including any financial records held by Bois Bois in relation to the transaction with which the relevant party was concerned. I expressed this view because there is clearly an issue between the parties as to what happened to funds held by Bois Bois, which should be capable of being answered on production of records on the instruction of the relevant party to Bois Bois. 7. The main application before me made by the plaintiff was for a stay pending an application for judicial review. 8. This application was brought because the plaintiff wishes to bring an application for judicial review concerning previous refusals to grant him legal aid. He is now bringing two applications, one in respect of another set of proceedings brought by him against Bois Bois, (see the judgment reported at Mayhew and Holmes-v- Bois Bois and Young

[2016] JRC 024) and one in respect of the present claim. However, in summary, the plaintiff's arguments are the same in both cases in that the plaintiff contends that the legal aid system in Jersey is contrary to his right to a fair trial under Article 6 of the European Convention of Human Rights. Without effective access to legal representation and to the Courts, the plaintiff argues that past orders of the Royal Court in relation to the dispute the subject matter of the present proceedings should be set aside and that the refusal of legal aid means that he is unable to progress the present action without the benefit of legal advice. Decision 9. The first issue I therefore had to consider was whether or not to grant the stay to allow an application for judicial review to be brought. 10. The second issue I had to consider, if I was not minded to grant a stay, was whether to order the question of whether or not a settlement to take place be determined by way of a preliminary issue or whether to give directions for the entire dispute to be resolved at a single trial. 11. At this point it is also right to record two observations of the first defendant. Firstly, he pointed out that the time for appealing against the judgment of the Royal Court referred to in paragraph 3 above had not yet expired and he was still considering whether or not to

appeal to the Court of Appeal. Secondly, he expressed his frustration at the conduct of the plaintiff both in relation to this litigation and other cases with which the plaintiff was concerned. This led him to express the view that the plaintiff was a vexatious litigant. The plaintiff's approach, he argued, was to make life as difficult as possible for the first defendant and any other defendants in the hope that the plaintiff would extracting some form of settlement. In this case the plaintiff's conduct had already led to the defendants incurring significant legal costs which meant that the defendants were now without representation. 12. In relation to the question of a stay, I proceeded on the assumption that the plaintiff might be granted leave to bring an application for judicial review. However, there are difficulties that his application has to deal with including whether or not administration of the legal aid scheme is capable of being subject to a judicial review application at all and why the application had not been brought before in respect of past decisions of the Royal Court which had been made in 2014. Applications for judicial review should generally be made as soon as possible and normally within no more than 3 months of the relevant decision. 13. I also considered the pleadings filed by the parties in this case to date. In summary, this case is primarily a factual dispute between the parties about what was agreed, whether that agreement was breached and what losses flow from any breach. It is not therefore a dispute where significant legal issues arise. Based on what I have seen of the plaintiff, who reassured me that the application for judicial review had been drafted by him without legal assistance, I felt that the plaintiff was more than capable of gathering evidence and making his case at trial in relation to the present dispute. I was not therefore satisfied that there were significant legal issues or legal questions which required the plaintiff to have access to legal advice to argue the present claim. Accordingly, I concluded that it was not appropriate to stay the present proceedings because of a possible application for judicial review to the plaintiff to obtain legal advice. I also took into account the delays that have already incurred in this dispute and the risk of evidence becoming stale if the claim was stayed in reaching my decision. 14. The next question I had to determine concerned what directions to give for trial. Ultimately the fundamental question was whether I should order a preliminary issue to take place as to whether or not the parties had reached a settlement agreement as referred to at paragraph 19 of the judgment of the Deputy Bailiff or whether there should be a trial of all issues. 15. The conclusion I reached was that it was not appropriate to order a preliminary issue. While referring the question of whether or not the parties had settled to the Royal Court for a preliminary issue was superficially attractive, I ultimately concluded that the most efficient way to progress this matter was to order a single trial at which all issues could be canvassed. 16. I reached this view applying the test which I had recently considered in *Stock v Pantrust International SA*

[2015] JRC 268 set out in *CMC v Forster RBC & Regent*

- [2016] JRC 149 at paragraphs 14 to 19 as follows:- "14. There was no disagreement between the parties on the applicable legal principles as to when a preliminary issue should be ordered. 15. I explored these principles in *Stock v Pantrust*
- [2015] JRC 268 at paragraphs 13 and 14 as follows:- "13. I was also reminded of the words of Southwell J. A. in *Public Services Committee v Maynard*
- [1996] JLR 343 at page 360 lines 11 to 19 as follows:- "However, in our judgment, the Royal Court should consider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues." 14. He also referred me to a decision of the English Court of Appeal reported at *McLoughlin v Groves*
- [2001] EWCA Civ 1743 . In setting aside a first instance judgment where a preliminary issue had been ordered and had taken place, the English Court of Appeal were critical of a trial on the issue of foreseeability of damage only. Mr Justice David Steel at paragraph 65 of the decision stated:- "No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability. It was wholly impracticable for there to be a full trial of the factual issues pertinent to foreseeability. It was an issue that should have presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately. In my judgment, the right approach to preliminary issues should be as follows:- a. Only issues which are decisive or potentially decisive should be identified; b. The questions should usually be questions of law; c. They should be decided on the basis of a schedule of agreed or assumed facts; d. They should be triable without significant delay, making full allowance for the implications of a possible appeal; e. Any order should be made by the court following a case management conference."" 16. While Advocate Speck warned me against treating the decision in *McLoughlin* as creating some form of code or binding legal principle, he did not dispute that the factors listed were useful guidance as to whether or not a preliminary issue should be ordered. I took these factors into account as set out below in reaching my decision. 17. Prior to the hearing I had also referred the parties to *X Children v Minister for Health and Social Services*
- [2011] JLR 772 . Paragraphs 10 to 12 are pertinent and state as follows:- '10 The possibility of taking a discrete issue which might determine the whole case, thus avoiding the costs which the parties would incur in taking the matter further, is attractive at first blush. An appeal against the decision to the Court of Appeal and potentially to the Privy Council, however, can without exaggeration add years to the process. A number of English and Jersey cases have warned against the practice. In the case of *Southwark L. B. v. O'Sullivan* (6), a case in which the construction of a statute was taken as a preliminary issue, Lewison, J. said this (

[2006] EWCA Civ 124 , at para. 14):- "As Lord Scarman observed in *Tilling v. Whiteman*

[1980] AC 1 , preliminary points of law are too often treacherous shortcuts, their price can be, as here, delay, anxiety and expense. As so often, the decision to try preliminary issues on assumed facts has lead [sic] to an over-complication of the case and puts the court into a position of having to decide questions, without a full picture of the factual background on which the case depends. In this case, as in many others, the decision to have a trial of preliminary issues has turned out to be a false economy. I have therefore reached the conclusion that this court should not embark upon a consideration of the questions of construction in advance of the fact-finding exercise." In *Public Servs. Cttee. v. Maynard* (5), our Court of Appeal (Southwell, J. A. presiding) gave a similar warning in the context of a personal injuries case (1996 JLR at 360): "It appears from the order of the Judicial Greffier of September 30th, 1994 that the issue he ordered to be heard as a preliminary issue, 'whether the plaintiff's right of action is prescribed,' was an issue of both fact and law. In the event, it was argued before the Lieutenant Bailiff and before this court simply as involving points of law. To choose points of law such as these for initial decision seems to us to be within the current practice of the Royal Court of Jersey. However, in our judgment, the Royal Court should reconsider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues together." In addition to the delays and costs that can be incurred through the appeal process, there is a further danger, in my view, in taking a preliminary point in a factual vacuum, particularly where, as here, Convention rights must be taken into account." 18. The court's reasoning in *X Children* in refusing to order a preliminary issue is found in paragraph 15 as follows:- "15. Taking into account the warnings given in particular by our Court of Appeal in *Maynard* that in personal injuries cases all issues should be tried together; the risk of substantial delays and costs being incurred through the appeal process; my concern about the court dealing with this issue in advance of the fact-finding exercise; and the relative merits of the arguments that would be presented to the court, I decline to order the trial of this preliminary issue." 19. I also took this guidance into account in reaching my decision." 17. In this case I was concerned that there would be an overlap between any preliminary issue and a trial. The plaintiff argued, and I accepted his submission, that in relation to any argument about whether or not he had reached a settlement agreement, he would wish to adduce evidence on the financial benefit he claimed he was entitled to and to challenge witnesses as to why he would settle on a drop hands basis given the significant value of his claim. This approach means that there would be an overlap between matters considered at any trial and on a preliminary issue. 18. I was also concerned about the effect of any appeal. If the preliminary issue failed, there could well be an appeal by the plaintiff which would delay the hearing of any trial. The risk of an

appeal is not just a theoretical possibility because the plaintiff in a number of different matters has exercised his right to appeal where he is not satisfied with the decision of a particular Court. 19. This is also a dispute that has already gone on since 2014 and relates to events from 2011 onwards. If a preliminary issue is ordered and is unsuccessful, any trial will be put off further, with the result that the Royal Court would be examining evidence and the recollection of parties some years after the events that have led to the present dispute. This factor also pointed towards a single trial of all issues taking place sooner rather than later. 20. Accordingly, I was not persuaded to order a preliminary issue. 21. What I did order was that the defendants should set out their case as to why they believed a settlement had taken place by way of a further and better statement of case with the plaintiff then filing a statement of case in response. I felt this was the most efficient way at this stage of the parties producing a summary of their respective positions in respect of the settlement agreement. I did not consider it necessary for amendments to pleadings to otherwise take place. 22. The other orders I made concerned setting a timetable for the provision of documents, witness statements and expert evidence. In relation to expert evidence, I gave permission for both a valuer who was a member of the Royal Institute of Chartered Surveyors and for an expert architect. Authorities Holmes-v-Lingard

[2015] JRC 172 . Holmes-v-Lingard

[2016] JRC 167 . Mayhew and Holmes-v- Bois Bois and Young

[2016] JRC 024 . Stock v Pantrust International SA

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